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NO. 75-206

IN THE UNITED STATES SUPREME COURT

NATIONAL CAR RENTAL SYSTEM, INC. NO. 74-1473
Plaintiff/Appellee
Cross-Plaintiff

VS. UNITED STATES
COURT OF APPEALS

BETTER MONKEY GRIP COMPANY
AND WILCO TRUCK RENTAL, INC.
Defendants/Appellants
Cross-Appellants

PETITION FOR WRIT OF CERTIORARI BY BETTER MONKEY GRIP COMPANY AND WILCO TRUCK RENTAL, INC. FROM JUDGMENTS AGAINST THEM RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Herbert S. Bonney, Jr.
1822 Fidelity Union Tower
Dallas, Texas 75201
Attorney for Petitioners

Ralph W. Currie
1310 Praetorian Building
Dallas, Texas 75201
Attorney for Respondent

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The petition of Better Monkey Grip Company and Wilco Truck Rental, Inc. for Writ of Certiorari to the Supreme Court of the United States of America, respectfully show the Court:

I.

The United States Court of Appeals for the Fifth Circuit rendered judgment (511 Fed. 2d, 724) reversing the United States District Court for the Northern District of Texas' judgment against Petitioners for $141,232.97, plus interest and remanding for a new trial in the District Court. Petitioners petitioned the Appellate Court for a rehearing which was denied by judgment dated June 25, 1975. The opinion of the District Court, and the opinion of the Court of Appeals and the order overruling the Petition for a rehearing in the Court of Appeals are attached hereto in the Appendix.

II.

The grounds upon which jurisdiction of this Court is invoked are:

(i) The date of the judgment of the Court of Appeals is April 21, 1975 and the date of its entry is April 21, 1975; the date of the judgment denying the Petition for Rehearing is June 25, 1975 and the time of the entry thereof is June 25, 1975. Petitioners seek a review of this Court of such judgments.

(ii) Jurisdiction of this Court is conferred by review of the judgments of the Court of Appeals by Title 28, Section 1254(1) USCA.

The question presented for review is (i) The Court of Appeals reversed the Trial Court for having rendered judgment NOV against Petitioners, the Trial Court having set aside the jury verdict which was favorable to Petitioners. The Court of Appeals erred in ordering a new trial. The case should have been remanded to the Trial Court and the Trial Court ordered to pass upon the Motion for a New Trial which motion had not been conditionally ruled upon by the Trial Court. The Petition for Rehearing called this error to the attention of the Court of Appeals and the Petition was denied. Petitioners here seek review of the judgments of the Court of Appeals on this point.

The Appellate Court ruled that the Trial Court erred in excluding evidence of conversations, custom and conduct of the parties as an aid to the interpretation of the ambiguous contract. In exercising its discretion to grant or not to grant a new trial the trial court would have the right and duty to apply the law as set down by the Appellate Court and could well decide that since such evidence must be considered that the jury's verdict was not against the greater weight and preponderance of the evidence. In her opinion granting motion for judgment NOV, the trial court stated that the evidence of intention of the parties as to the time of closing the sale was not admissible. The jury had heard the evidence which the trial court thought was inadmissible and considered such evidence in arriving at its verdict that the sale was not closed within a reasonable time. The trial court set aside the jury's verdict because it erroneously ruled that the extrinsic evidence as to reasonable time was not admissible. The Appellate Court has ruled that the evidence was admissible. The trial court must,

therefore, be given the opportunity to rule upon the Motion for New Trial with the knowledge that such extrinsic evidence was actually admissible. The trial court's decision could well be that the verdict of the jury was supported by a greater weight and preponderance of the evidence in view of the fact that such evidence was admissible.

There are many cases where a District Judge has seen fit to grant a judgment NOV but has also decided that in the event he should have let the verdict stand, then he would exercise his discretion to deny the new trial. See Hooks v. New York Central RR, 214 Fed. Sup. 4 (NDNY, 1963); Zimmerman v. Matthews Trucking Corporation, 105 Fed. Sup. 57 (W.D. Arkansas, 1952); Bolter v. Comm. Standard Ins. Co., 78 Fed. Sup. 895 (N. D. Cal., 1948).

The Appellate Court has ordered, contrary to the decisions of other circuit courts and contrary to the accepted and usual procedures, that this cause must be tried again in its entirety. The Appellate Court has thus usurped the traditional function of the trial court. The trial court in exercising her discretion to grant a new trial in this cause could well determine that the matter has been fully developed on its merits in light of the Appellate Court's ruling that evidence outside of the contract was admissible to interpret the contract and that the jury having considered those facts reached a proper verdict. The trial court in its consideration of the Motion for a New Trial could well determine that the evidence which would be introduced in a new trial would be the same as is in the record of the trial and that a new trial could not be justified, and would be a waste of the court's time.

FACTS:

A. This case was determined by the intention of the parties to close the sale of tractors and trailers timely under the terms of a written contract. Extrinsic evidence of time to close the sale was admitted to explain the ambiguity of the written contract, the contract being ambiguous as to the time of completing the sale.

B. The trial court, after jury verdict favoring Petitioners, disregarded the verdict and granted judgment NOV for Respondent. The trial court's reasoning expressed in her written opinion was that the jury considered inadmissible extrinsic evidence including conversations, custom and conduct of the parties used to explain the intention of the parties. A Motion for New Trial filed by Respondent in the alternative was not ruled on by the Trial Court.

C. The Appellate Court reversed the trial court's judgment NOV and held custom, conversations and conduct was admissible.

D. The Appellate Court, exercising the discretion it believed the trial court might have exercised, ordered an entire new trial.

E. The Trial Court was not given the opportunity to rule on the Motion for New Trial after the Appellate Court ruled extrinsic evidence was properly considered by the Jury.

ARGUMENT

This Court should exercise its jurisdiction to grant a Writ of Certiorari under Rule 19 because the opinion of the Fifth Circuit was in conflict with the decision of another Court of Appeals on the same matter and because the Fifth Circuit has departed from the accepted and usual course of judicial proceedings in ordering a new trial.

The Appellate Court may not itself exercise the trial court's discretion to order a new trial but must remand to the trial court so that the trial court may exercise its discretion except under unusual circumstances. Hazeltine Corp. v. Wildermuth, (CCA 2d, 1929) 35 Fed. 2d, 733; Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co, (CCA 6th, 1930) 48 Fed. 2d, 73, Boro-Hall Corporation v. General Motors Corporation (CCA 2nd, 1942) 130 Fed. 2d, 196, Cert. denied 317 US, 695. It has always been the classic, federal dogma, that a motion for new trial is addressed primarily to the discretion of the trial court. 5A Moore's Federal Practice, Section 59.16 and Section 59.09(5).

The Federal dogma has similarily been applied when Appellate Courts have overturned trial courts' judgments notwithstanding the verdict as in the present case. Montgomery Ward and Company v. Duncan, 311 US, 243, 61, S. Ct. 189, 85 L. Ed., 147 (1940); Marsh v. Illinois Central Railway Co. (CA 5th, 1949) 175 Fed. 2d, 498; Robinson v. Isbrandtsen Co. (CA 2d, 1953) 203 Fed. 2d, 514.

Moore's Federal Practice R59-296 expressed the rule:

"If, however, the trial court grants judgment NOV, but does not rule on the motion for new trail and the judgment is reversed by the Appellate Court, it should normally remand to the trial court with directions to rule on the motion for a new trial."

No unusual circumstances exist in the present case which would justify a breach of the usual and accepted procedures. Appellee's Motion for New Trial is based upon the jury's verdict being against

the greater weight and preponderance of the evidence and not upon the discovery of fraud, jury tampering or discovery of new evidence.

WHEREFORE, Petitioners pray that this honorable Court issue Writ of Certiorari to the Court of Appeals for the Fifth Circuit and that an appeal be granted.

Respectfully submitted,

Herbert S. Bonney, Jr.

OF COUNSEL:
Bonney, Wade & Stripling
1822 Fidelity Union Tower
Dallas, Texas 75201
Phone: 214-742-7191

CERTIFICATE

I certify that three copies of the above and foregoing have been delivered in person to the Honorable Ralph Currie, attorney for Respondent, 1310 Praetorian Building, Dallas, Texas 75201.

Herbert S. Bonney, Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1974

No. 74-1473

D. C. Docket No. CA 3-5614-B

NATIONAL CAR RENTAL SYSTEM, INC.,
Plaintiff-Appellee-Cross-Appellant,

versus

BETTER MONKEY GRIP COMPANY and WILCO TRUCK RENTAL, INC.,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court for the Northern District of Texas

Before BELL, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee-cross-appellant pay to defendants-appellants-cross appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 21, 1975

Issued as Mandate:

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1473

NATIONAL CAR RENTAL SYSTEM, INC.,
Plaintiff-Appellee
Cross-Appellant,

versus

BETTER MONKEY GRIP COMPANY AND
WILCO TRUCK RENTAL, INC.,
Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the
Northern District of Texas

ON PETITIONS FOR REHEARING

(June 25, 1975)

Before BELL, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL CAR RENTAL SYSTEM, INC.

V. CA 3-5614-B

BETTER MONKEY GRIP CO., ET AL

MEMORANDUM OPINION AND ORDER

On March 7, 1972, plaintiff NATIONAL CAR RENTAL SYSTEM, INC. ("National") filed its Complaint in the above styled and numbered cause asserting breach of contract by Defendant, BETTER MONKEY GRIP CO. ("Monkey Grip") and tortious encroachment upon business relations by defendant WILCO TRUCK RENTAL, INC. ("Wilco"). Both defendants filed counterclaims arising from the same business transaction.

Following a jury trial on the complaint and counterclaims, this cause is now before the court on the Joint Motion of defendants for a Judgment on the Jury's Verdict and plaintiff's Motion for Judgment Notwithstanding Jury's Verdict. As hereinafter set forth, a judgment is hereby entered for plaintiff.

On July 12, 1962, The Baker-Thompson Company, as Lessor, and Monkey Grip, as Lessee, executed a contract for the lease of certain transportation related equipment consisting principally of trucks and trailers. Pl. Ex. 1. This contract stated the

terms of the lease agreement with the parties to execute supplemental "schedules" to add or delete equipment as necessary. Sometime prior to 1971, National acquired The Baker-Thompson Company thereby succeeding to its rights under the contract at issue.

Although the specific equipment covered by the contract changed through the years, it is undisputed that on May 17, 1972, Monkey Grip was the lessee of the equipment designated in Pl. Ex. 2 as Schedules 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 29 (2 pages) collectively known as "schedules A."

While the vehicles identified in Pl. Ex. 2 were leased to Monkey Grip, National permitted the equipment to be stored on its premises at night when the equipment was in Dallas. This was partly for the convenience of Monkey Grip and partly because the contract stipulated a regular maintenance schedule to be performed by National. Para. 6, Pl. Ex. 1.

On May 19, 1971, Monkey Grip, acting by and through its Executive Vice President L. M. Everett, Jr., cancelled the lease with National in accordance with paragraph 11/(a) of the contract. Pl. Ex. 4. In that cancellation notice, Monkey Grip requested copies of the schedules A "immediately."

In the event of cancellation paragraph 11(a) of the contract obligated Monkey Grip to give 60 days notice and to purchase from National all equipment covered by unexpired schedules A at the time of cancellation. As of July 17, 1971, however, National had not transmitted to Monkey Grip (Pl. Ex. 2), copies of the outstanding schedules A or a statement of the purchase price as computed pursuant to paragraph 11(a) of the contract.

Because of the substitution of new vehicles, Monkey Grip did not have in its possession accurate copies of oustanding schedules A on July 17, 1971, and, therefore, could not compute the purchase price of the equipment.

Contemporaneous to the cancellation notice on May 17, 1971, Monkey Grip and Wilco executed a Truck Lease and Service Agreement. Pl. Ex. 15, Def. B.M.G. Ex. 3. By that agreement, Wilco was to purchase for Monkey Grip the equipment then under lease from National and indemnify Monkey Grip for any expenses it incurred.

On July 21, 1971, D. P. Hollen, Dallas City Manager for National, by memorandum requested Dolores Brown in National's home office in Minneapolis to transmit to him titles for the equipment covered by the Monkey Grip lease. Def. Wilco Ex. 17. By certified mail received August 2, 1971, Ms. Brown mailed to Hollen titles for all of the vehicles at issue except unit T13891. As that unit was mortgaged to a third party, it was necessary for National to pay off the mortgage before a title could be mailed. That title was finally received in October 1971.

On August 3, 1971, National executed in Dallas a "seller's affidavit" and bill of sale for each piece of equipment, including unit T13891. These documents were notarized by Wilma E. Kelly. Def. Wilco Ex. 20.

By correspondence dated August 2, 1971, and hand delivered on August 5, 1971 by Hollen, National transmitted to Monkey Grip an itemized statement of the purchase price for each vehicle, a schedule of unamortized ancillary costs, and a final bill for

equipment covered by the lease agreement. Pl. Ex. 5. The transmittal letter stated bills of sale were included, but these were not found enclosed.

By correspondence dated August 9, 1971, Monkey Grip advised National that it would not honor its obligations pursuant to paragraph 11(a) of the contract because the purchase price information was not furnished until August 5th and titles to the equipment had not been delivered. Pl. Ex. 6.

National on September 28, 1971, made demand on Monkey Grip to honor its contractual obligations. Pl. Ex. 7.

Monkey Grip again refused asserting that National's refusal to deliver titles to the equipment by July 17, 1971, made the contract void since "time was of the essence." Pl. Ex. 8.

Finally, on October 12, 1971, National notified Monkey Grip that an "event of default" was defined in the contract had occurred and that National was asserting its rights under paragraph 13 of the contract. Pl. Ex. 9.

National on November 29, 1971, requested bids on the fair market value of the equipment at issue by independent companies. Pl. Ex. 10. As a result of 6 appraisals submitted by four firms, National found the fair market value of the equipment at issue, including unit T13891, in November 1971 to be $129,750.00.

As separately computed by National, the contract depreciated value of the equipment, including unit T13891, on October 21, 1971, totalled $222,484.03. Pl. Ex. 13. Thus, plaintiff in this cause seeks damages pursuant to paragraph 13 of the contract equal to the difference between the fair market value of the equipment and the contract depreciated price of the equipment as computed as of the date of default, i.e.

Contract Depreciated Price	$222,484.03
(less) Fair Market Value	129,750.00
Damages Alleged	$ 92,734.03

Also alleged are damages for accrued rental, unamortized license fees and taxes, and moving expenses together with attorney fees.

Defendant Monkey Grip counterclaimed for damages due to (a) incorrect billings by National in an amount between $100,000.00 and $200,000.00, (b) exemplary damages for malicious fraudulent acts by National, and (c) other specific damages totalling $165,319.44.

Defendant Wilco counterclaimed against National for $50,000.00 actual damages and $200,000.00 exemplary damages for National's interference with Wilco's business relations with Monkey Grip.

By a Stipulation of Fact filed September 17, 1973, defendants Wilco and Monkey Grip agree that under the terms of the lease agreement executed by them (Pl. Ex. 15, Def. B.M.G. Ex. 3), Wilco shall hold Monkey Grip harmless from any damage or expenses in this cause and in the event any judgment is rendered against Monkey Grip, a judgment in favor of Monkey Grip against Wilco shall be entered in the exact same amount.

After a thorough review of the evidence presented at trial and a careful re-examination of the pleadings, briefs and related documents, the court hereby declares the answers of the jury to special issues submitted in this court's charge to be against the weight and preponderance of the evidence and, therefore, null and void, except where specifically adopted herein.

The contract sued upon (Pl. Ex. 1)is admitted by the parties to be a valid contract under Texas Law.

The only issue as to plaintiff's cause of action is whether defendant Monkey Grip defaulted under the contract thereby allowing damages under paragraph 13.

Monkey Grip's May 19, 1971 letter (Pl. Ex. 4) was a valid cancellation of the contract under paragraph 11(a) of the contract. Thus, Monkey Grip became obligated to purchase all equipment currently under the contract as itemized in Pl. Ex. 2.

The fact that National did not within the 60 day cancellation notice period supply to Monkey Grip copies of the schedules or titles is not a defense for Monkey Grip's failure to purchase the equipment. No provision of the contract requires National to furnish such documents within 60 days of cancellation. Titles to the equipment were to be furnished only after "....the entire purchase price is paid." Pl. Ex. 1, Paragraph 11(a).

The argument that "custom or usage" of the trade required National to submit to Monkey Grip within the 60 day period copies of the schedules A

is irrelevant and inapplicable to this action. First, the contract at issue is the complete agreement between the parties and may not be enlarged by the written agreement of the parties. Pl. Ex. 1, Paragraph 14. Monkey Grip cannot, therefore, impose an additional requirement upon National. See S.K.Y. Investment Corp. v. H. E. Butt Grocery Co., 440 S.W. 2d 885 (Tex. Civ. App. 1969), no writ history. Second, in the alternative, the doctrine of "custom or usage" when applicable has

> . . . certain well defined purposes, to explain incidental rights . . . to construe contracts in relation thereto, and to ascertain the meaning of words and expressions therein . . ."

Schaub v. Dallas Brewing Co., 80 Tex. 634, 16 S. W. 429, 430 (1891). However, custom or usage can never be asserted to vary the terms of a contract as defendant Monkey Grip contends in this action. See Republic National Bank v. National Bankers Life Insurance Co., 427, S. W. 2d 76, 80 (Tex. Civ. App. 1968), reh. den., writ of error ref. n.r.e.

While it is true that on the 60th day following notice of cancellation, defendant Monkey Grip did not have in its possession schedules A wherey it could calculate the purchase price that fact does not justify its non-performance of its contractual obligation to purchase the leased equipment.

When the promisor is unable to perform its obligation at the scheduled time because the promisee has in its possession information necessary to such performance, the temporary impossibility of performance acts only to suspend the duty of performance while such impossibility exists. RESTATEMENT OF CONTRACTS. Sec. 462.

Although certain paragraphs of the contract contain provisions as to time (see, e.g., Pl. Ex. 1, paragraphs 3, 6, 11(a), 11(b), 13) there is no provision making time of the essence as to the entire contract and paragraph 11(a) does not impose any "time is of the essence" obligation on National with respect to calculation of the purchase price. Therefore, the time frame is one that is reasonable under the circumstances. See Williams v. Shamrock Oil & Gas Co., 128 Tex. 146, 95 S.W. 2d 1292 (Com. App. 1936).

Under the contract after notice of cancellation was given, there was no obligation on National to supply Monkey Grip with anything. Due to the delivery procedures employed, Monkey Grip did not have in its possession a schedule A for each piece of equipment and could not compute the purchase price. The August 2, 1971, letter from National, however, correctly stated the contract purchase price computed as per paragraph 11(a) as of July 17, 1971. Although Monkey Grip did not agree with the schedule of unamortized expenses attached to that letter, there is no dispute as to the accuracy of calculation of the purchase price. The contract clearly distinguishes between the purchase price upon cancellation of the contract and a separate payment of other expenses such as highway use taxes. Any dispute over the payment of the other expenses under paragraph 11(a) does not excuse Monkey Grip's failure to purchase the equipment. Other questions could have been settled later by the parties.

As to the time frame involved, this court holds the delivery of a correct itemized statement of the purchase price on August 5, 1971, to be reasonable under the circumstances. The contract terminated 60 days from May 19, 1971, i.e.: on July 17, 1971-- a Saturday. The following Wednesday, July 21, 1971, National requested preparation of the titles. Def. Wilco Ex. 17. While the titles were being prepared in Minneapolis, Minnesota, for delivery

in Dallas, Mr. Hollen prepared an itemized statement of the purchase price per piece of equipment as of July 17, 1971, that would later be attached to Pl. Ex. 5. When the titles arrived in Dallas on August 2, 1971, Hollen prepared his letter of transmittal. The next day (August 3, 1971) bills of sale were notarized by Hollen. Def. Wilco Ex. 20. Finally, on August 5, 1971, the letter was hand delivered to Monkey Grip. This procedure was as expeditious as possible and quite reasonable under the circumstances.

As of August 5, 1971, Monkey Grip had the correct information whereby it could have purchased the equipment pursuant to paragraph 11(a) of the contract. Its failure to do so was "an event of default" as stated in paragraph 13 of the contract.

On September 28, 1971, National wrote a reply as to whether Monkey Grip wished to reconsider. Despite this letter, Monkey Grip failed to honor its obligations and on October 12, 1971, National declared a default pursuant to clause 13 of the contract. (Pl. Ex. 9). In this context, it is not material that National construed the event of default to be non-payment of rental for the post-July 17, 1971 period. Monkey Grip had cancelled the contract and acknowledged its obligation to purchase the equipment. Once given information that cured its inability to perform, its failure to tender payment for the equipment constituted a default.

Under paragraph 13 of the contract, National is now entitled to a judgment in its favor against Monkey Grip for the difference between the fair market value as of the default in October, 1971, and the then depreciated value.

The fair market value was reasonably calculated by National on the basis of independent appraisals to be $129,750.00. This court accepts that figure as correct and determined in accordance with the terms of the contract.

The depreciated value of the equipment on the date of default is a mathematical computation made with the figures listed on the schedules A as was done by National on Pl. Ex. 13, which is hereby accepted by the court as true and correct.

Therefore, a judgment will be entered for plaintiff in the sum of $92,734.03.

National's request for a judgment of $33,553.87 as accrued rental for the period July 18, 1971, through October 21, 1971, will be denied.

Defendant Monkey Grip cancelled the contract with 60 days notice on May 19, 1971. Therefore, its right to legal possession of the equipment terminated on July 17, 1971. As the equipment was on that date already in the possession of National because it was parked on National's property, upon the termination of the contract legal and equitable title reverted to National such that no rental is owed after July 17, 1971.

Likewise National's request for a judgment covering unamortized federal highway use taxes and license fees will be denied. Had Monkey Grip completed its purchase under paragraph 11(a) of the contract, then such unamortized costs were to be paid to National; however, since Monkey Grip defaulted, National is limited to the damages specifically set forth in paragraph 13 of the contract.

As to National's request for a judgment covering moving expenses incurred in transporting the equipment to other cities where it could be leased, this is a reasonable, foreseeable expense incurred as a result of Monkey Grip's default and based upon credible evidence presented at trial therefore an award of $3,776.94 will be entered.

The jury's answers to special issues 7(a) and 7(b) are hereby adopted by the court and plaintiff's attorney awarded as reasonable attorneys fees the sum of $44,722.00 with the provision that if no appeal is taken from this judgment a remittur of $10,500.00 shall be entered by this court.

As to the counterclaims of Monkey Grip, the jury's answer to special issue 8 is hereby adopted by the Court to the effect that Monkey Grip did not incur any expenses by reason of National's failure to furnish information on the purchase price before July 17, 1971.

The jury's answer to special issue 9 is also hereby adopted in that National did not incorrectly bill Monkey Grip for mileage not actually travelled.

There is no evidence that the services rendered by National after the May 19, 1971, notice of cancellation deteriorated or that Monkey Grip sustained any damages as the result of such services. On the contrary, Monkey Grip continuously asserted that it did not use the equipment after May 19, 1971, even though legally entitled to do so. Accordingly, no relief will be awarded on that counterclaim.

Inasmuch as no actual damages were sustained by Monkey Grip, no award of exemplary damages will be made.

As to the counterclaim of Wilco, there is no evidence that will sustain a verdict that National interferred with the business relationship between Wilco and Monkey Grip. The triparte business relationship that developed with National and Wilco attempting to be the "lessor" of equipment for Monkey Grip did not involve tortious conduct by any party.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

(a) The counterclaims of defendants Wilco and Monkey Grip be and the same hereby are DENIED;

(b) Plaintiff National be and the same hereby is awarded a judgment against Monkey Grip as follows:

(i)	Breach of Contract	$ 92,734.03
(ii)	Moving Expenses	3,776.94
(iii)	Attorney fees	44,722.00
(iv)	Items (b) (i) and (ii) to bear interest at 6% per annum running from October 21, 1971, until paid	

(c) In the event there is no appeal from this Order, a remittur in the amount of $10,500.00 shall be entered in the judgment otherwise entered in (b) (iii) above; and

(d) Defendant Monkey Grip be and the same hereby is awarded a judgment against defendant Wilco equal to and under the same terms as stated in (b) and (c) above; and,

(e) All costs in this action are assessed against the defendants.

SIGNED AND ENTERED this 23 day of October, 1973.

s/ Sarah T. Hughes
United States District Judge

NATIONAL CAR RENTAL SYSTEM, INC., Plaintiff-Appellee-Cross-Appellant,

v.

BETTER MONKEY GRIP COMPANY and Wilco Truck Rental, Inc., Defendants-Appellants-Cross-Appellees.

No. 74-1473.

United States Court of Appeals, Fifth Circuit.

April 21, 1975.

Lessor of trucks brought diversity action against lessee and another lessor which had entered into equipment lease with lessee to recover the contract price of the vehicles upon termination of the lease contract. Following a jury trial, the United States District Court for the Northern District of Texas at Dallas, Sarah T. Hughes, J., granted a judgment n. o. v. in favor of lessor and the defendants appealed and the lessor cross-appealed. The Court of Appeals, Roney, Circuit Judge, held that Texas law governed the admissibility of extrinsic evidence; that under Texas law, extrinsic evidence was admissible as an aid in interpreting the intention of the parties where the contract was ambiguous and uncertain on the termination and purchase procedures; and that the trial court committed reversible error by granting judgment n. o. v. after setting aside as being against the great weight and preponderance of the evidence the jury's finding that the parties did intend that information relative to repurchase of the trucks be furnished within 60 days after written notice of cancellation where the evidence was in conflict on the issue and peripheral issues.

Reversed and remanded.

1. Courts ⇐376

Question of admissibility of extrinsic evidence concerning "usage and custom" among lessors and lessees of trucks and testimony by official of lessor's predecessor who negotiated truck lease with lessee as to the discussion of the parties at that time was issue of state substantive law governing construction of contracts so that Texas law was applicable in diversity action brought by lessor against lessee in federal court sitting in Texas.

2. Customs and Usages ⇐15(1)

Under Texas law, evidence of "usage and custom" among truck lessors and testimony by official of lessor's predecessor who negotiated truck lease with lessee as to the discussion of the parties at that time concerning obligation of lessor at time of termination of contract to furnish vehicle schedules needed in order to calculate contract purchase price was admissible where the lease contract was ambiguous and uncertain on the termination and purchase procedures.

3. Courts ⇐406.5(21)

In setting aside jury's finding that lessor and lessee intended that information relative to repurchase of trucks be furnished within 60 days after written notice of cancellation as against the weight of the evidence, the trial court engaged in a discretionary exercise of the judicial function which was reviewable on the abuse of discretion standard.

4. Courts ⇐406.6(3)

Where there was little evidence, and no instruction, as to lessor's duty, if any,

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to compute the truck purchase price information and supply the figures to lessee upon termination of truck lease contract but jury found in special interrogatory that the parties did intend that information relative to repurchase of the trucks be furnished within 60 days after written notice of cancellation, the trial court did not commit reversible error by setting aside the jury's finding as being against the weight of the evidence.

5. Courts ⇐406.6(12)
Federal Civil Procedure ⇐2608

Where jury's finding on special interrogatory that lessor and lessee intended that information relative to repurchase of leased trucks be furnished within 60 days after written notice of cancellation of lease contract was against the weight of the evidence but the evidence was in conflict, trial court committed reversible error by granting judgment n. o. v. rather than granting new trial.

6. Federal Civil Procedure ⇐2339

A determination that jury's answers to special interrogatories were against the weight and preponderance of the evidence, although not adequate for granting a judgment n. o. v., can be proper for granting new trial.

7. Federal Civil Procedure ⇐2142, 2608

A trial judge may grant an instructed verdict or a judgment n. o. v. only where as matter of law the evidence is insufficient to sustain the claim, issue or defense.

8. Federal Civil Procedure ⇐2126, 2610

In passing on motion for directed verdict or judgment n. o. v., the court does not exercise discretion but decides a pure question of law, that is, whether the evidence, considered in the light most favorable to the party against whom the motion was directed, affords substantial support for a verdict in his favor.

9. Federal Civil Procedure ⇐2313

Trial court may and should exercise sound discretion on motion for new trial.

10. Courts ⇐406.5(21)

Ruling on motion for new trial will not be reviewed in absence of clear abuse of discretion.

11. Federal Civil Procedure ⇐2339
Jury ⇐37

On motion for new trial, trial judge may set aside a verdict and grant new trial if in his opinion verdict is against clear weight of evidence or will result in miscarriage of justice, even though there may be substantial evidence which would prevent direction of verdict; exercise of such power is not in derogation of right to trial by jury.

Appeals from the United States District Court for the Northern District of Texas.

Before BELL, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is a Texas diversity suit on a written contract. Trial was to a jury on special interrogatories covering various theories advanced by the parties. After the jury answered the special interrogatories, defendants filed a motion for judgment based on these verdicts, while plaintiff filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The district court reviewed the evidence presented at trial, re-examined the pleadings, briefs and related documents which had been submitted and declared the answers of the jury "to be against the weight and preponderance of the evidence and, therefore, null and void, except where

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specifically adopted." The court granted a judgment n. o. v. in favor of plaintiff without applying the correct legal standard set forth in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). By this action the defendants were deprived of their right to a jury trial, although the standard utilized by the court would have been appropriate for the granting of a new trial. United States v. 1160.90 Acres of Land, 432 F.2d 910, 915 (5th Cir. 1970); United States ex rel. Weyerhaeuser Co. v. Bucon Construction Co., 430 F.2d 420, 423 (5th Cir. 1970); Wright & Miller, Federal Practice and Procedure: Civil § 2806 (1973). Consequently, we reverse and remand for a new trial.

The case involved the termination of a contract for the lease of trucks and trailers and the consequent obligation to purchase the equipment by the lessee. The controversy centered around the obligation of each party upon termination of the contract. The plaintiff lessor sued for the contract price of the vehicles. The defendants defended on the ground that the contract seller had failed to provide purchase price information and titles within the proper time, voiding the obligation of the lessee to purchase. A somewhat detailed history of the facts and proceedings is necessary to an understanding of the issues in the case.

In 1962, Baker-Thompson Company purchased Better Monkey Grip Company's fleet of trucks and trailers and leased the equipment back to Monkey Grip. Sometime prior to 1971, plaintiff, National Car Rental System, Inc., acquired the Baker-Thompson Company, thereby succeeding to its rights and obligations under the contract.

The vehicles under lease were described in schedules attached to the written contract. When one vehicle was replaced by another, a new schedule describing the replacement was executed and substituted for the schedule describing the vehicle being withdrawn, without reexecution of the entire contract. In addition to describing the vehicle, each schedule showed the delivery date of the vehicle, the expiration date for the vehicle's use under the contract, the agreed value of the vehicle, and the agreed rate of depreciation.

Paragraph 11 of the contract gave the lessee, Monkey Grip, the right to terminate the lease as to any particular vehicle, after the vehicle had been in Monkey Grip's service for one year, by giving sixty days written notice.[1] It also provided, however, that if the termination was to become effective prior to the expiration date applicable to a particular vehicle, Monkey Grip was obligated to purchase the equipment by paying, in cash, a sum equal to the difference between the agreed value and the agreed accrued depreciation. Monkey Grip also agreed to pay, upon cancellation of the lease, all unamortized license tag costs, Federal Highway Use Taxes, and the painting and lettering costs attributable to the vehicles. Title to the vehicles was

1. 11. (a) After one year from the delivery date, LESSEE may elect to cancel this agreement as to any particular scheduled vehicle by giving to OWNER 60 days written notice of such election; provided, however, that if prior to expiration date, LESSEE must purchase and pay for such vehicle in cash the scheduled agreed value therefor, less a sum for depreciation calculated at the rate shown (depreciated price). The depreciated price shall not be less than 15% of said agreed value. Vehicle title shall remain in OWNER until the entire purchase price is paid. LESSEE also agrees to pay, upon such cancellation, all unamortized license tag costs, Federal Highway Use Tax, and OWNER'S painting and lettering costs.

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to remain in the owner-lessor until the entire purchase price was paid by the lessee, Monkey Grip.

In the spring of 1971, Monkey Grip and Wilco Truck Rental, Inc. entered into negotiations which eventually culminated in a truck lease and service agreement which would eliminate the need for the contract with National. The agreement was signed on May 17, 1971.

By an oral agreement with Monkey Grip, Wilco obligated itself to purchase the equipment which Monkey Grip had been leasing from National and which Monkey Grip was obliged to purchase under its contract with National. Wilco intended, to the extent that the new vehicles described in its lease with Monkey Grip had not arrived at the time the National lease terminated, to permit Monkey Grip continued use of the old National fleet of vehicles. By this same agreement, Wilco agreed to indemnify Monkey Grip for any expenses incurred in canceling the National contract.

Shortly thereafter, National's Dallas office received from Monkey Grip a letter dated May 19, 1971, which gave notice "to cancel all vehicles covered by the Vehicle Lease Agreement" between National and Monkey Grip. The notice also stated:

> Said Vehicle Lease Agreement has a 60 day cancellation notice, however, we will be willing to take over this equipment immediately or no later than July 17, 1971.
>
> We would like the purchase price on our equipment and copies of all executed Schedule A's immediately. Wilco Truck Rental, Inc. will give you a Certified Check for the equipment upon receipt of said equipment and titles.
>
> We will require separate invoices for each piece of equipment showing the depreciated value of the equipment plus the depreciated amount of taxes and licenses with a total for each.

During the next few weeks, various officials of both Monkey Grip and Wilco contacted National officials in its Dallas office by telephone in an effort to expedite the buy-out so that there could be uninterrupted use of the vehicles. They also sought, as originally requested in the May 19 letter to National, purchase price information and copies of all vehicle schedules currently in effect. Although these documents were an integral part of the contract between National and Monkey Grip and had to be signed by Monkey Grip to be effective, Monkey Grip apparently did not have in its possession accurate, completed copies of all outstanding schedules which it needed to verify and compute the purchase price of the equipment. In response to these telephone calls, National stated that it elected to run the equipment out the sixty day period, that company policy required it to supply buy-out information only to its lessee, and that the purchase price information was not ready for Monkey Grip.

The sixty day notice period expired on July 18, 1971.[2] On July 18, neither Monkey Grip nor Wilco had received any of the material which had been requested from National. Nor had National made any effort to make the titles to the vehicles available to either party. As a matter of fact, the Dallas branch of National did not even request that the titles to the equipment be transmitted to it from

2. In its cancellation letter, Monkey Grip had computed this period as ending on July 17. This error resulted because the letter to National was sent a day later than originally anticipated.

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the home office in Minneapolis until July 21, three days after the end of the cancellation period. With the exception of one unit which was subject to a mortgage which had to be paid off, the titles to all vehicles were transmitted by certified mail and were received in Dallas on August 4, 1971. The title subject to the mortgage was finally received in October 1971.

During the workweek which began on Monday, July 12, 1971, Monkey Grip returned all of the leased vehicles to the National maintenance lot, except one which was dispatched on a trip to California and which was returned on July 22. Thereafter, Monkey Grip never again used the National vehicles.

By correspondence dated August 2, 1971, and hand delivered on August 5, 1971, National delivered to Monkey Grip an itemized statement of the purchase price for each vehicle, a schedule of unamortized ancillary costs as provided for by the contract, and a final bill for equipment covered by the lease agreement. Monkey Grip claims that some of the purchase price information was incorrectly calculated and that some of the unamortized costs were improperly included in the accounting. It further argues that it was unable to check the figures since National had never furnished the completed vehicle schedules requested.

By letter dated August 9, 1971, Monkey Grip advised National that it would not purchase the fleet of vehicles pursuant to paragraph 11 of the contract because the purchase price information was not timely furnished as requested and because neither titles to the equipment nor the equipment itself had been delivered. The letter provided:

Due to the fact that we were not provided with the necessary information at the prescribed time, we were forced to rent outside equipment in order to perform our necessary transportation needs and were required to pay a premium price (along with other problems incurred). This was due to your company's failure to furnish our company with the required information (and the equipment) to enable us to deliver the equipment to our present contractor and use the equipment under lease agreement with said contractor after the expiration date of July 17, 1971. It was not until August 5, 1971 that the required information was presented. A period of nineteen (19) days elapsed between July 17, 1971 and August 5, 1971, at which time we were presented a portion of the required information and paper work needed in accordance with the letter of cancellation. Therefore, we are returning the equipment billing and miscellaneous billing to your company as, in accordance with our interpretation of our contract, *we feel no obligation to purchase the equipment, due to the delay and failure of National Car Rental in complying with the lease agreement as required.* (Emphasis added).

Once Monkey Grip finally returned the leased vehicles to National, Wilco had the obligation of furnishing transportation equipment to Monkey Grip. It procured other vehicles for temporary use by Monkey Grip until the new fleet of trucks and trailers contemplated under the Wilco-Monkey Grip contract were delivered and put in service.

National by letter dated September 28, 1971, made demand on Monkey Grip to honor its contractual obligations. Monkey Grip again refused, asserting that

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National's failure to deliver titles to the equipment by July 17, 1971, relieved Monkey Grip of its obligation to purchase the equipment. Finally, on October 12, 1971, National notified Monkey Grip that an "event of default," as defined in the contract, had occurred and that National was asserting its right to terminate the contract. This suit was brought shortly thereafter.

The defendants have proceeded throughout the course of this litigation on the theory that since National did not furnish the information requested in the May 19 letter in the prescribed time, Monkey Grip had no obligation to purchase the equipment leased from National. The jury was asked to answer a series of special interrogatories addressed to this theory.[3] It found that (1) sixty days was a reasonable time for National to furnish Monkey Grip the buy-out information, (2) National's furnishing information on August 5 was unreasonable, and (3) it was the intention of the parties that this information would be furnished within sixty days of the cancellation notice. The trial judge found these jury findings to be against the weight and preponderance of the evidence but went on to hold that August 5 was, under the circumstances, a reasonable date to furnish the itemized buy-out information.

There is no provision in the contract between Monkey Grip and National, specifically none in paragraph 11, *supra* note 1, which imposes upon National any obligation to furnish the information requested by Monkey Grip. The contract provides only that Monkey Grip must, under the circumstances of this case, purchase and pay for the equipment until which time the title to the equipment is to remain in National. The express terms of the contract only require National to supply Monkey Grip the equipment and titles *after* the purchase price had been paid.

The defendants argue that National, nevertheless, had an implied obligation to furnish the requested information within the sixty day period. Due to the

3. SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that August 5, 1971, was a reasonable time for National Car Rental to furnish Monkey Grip the buy out information as outlined in paragraph 11(a) of the contract?

Answer "yes" or "no". ANSWER No

If you have answered Special Issue No. 5 "no", then answer Special Issue No. 6.

SPECIAL ISSUE NO. 6

On what date do you find from a preponderance of the evidence it would have been reasonable for National Car to have furnished the information requested in Plaintiff's Exhibit 1, paragraph 11(a)?

Answer by giving the day, if any. ANSWER 60 days (7-17-71)

SPECIAL ISSUE NO. 6A

Do you find from a preponderance of the evidence that it was the intention of the parties that under the provisions of paragraph 11(a) of the contract in question information relative to repurchase of the trucks would be furnished within 60 days after written notice of cancellation?

Answer "It was not" or "It was". ANSWER It was

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delivery procedures employed, Monkey Grip often did not receive completed copies of the vehicle schedules after new vehicles were put in service. The completed schedules contained certain information which was not on the copies signed and retained by Monkey Grip in ordering the equipment. The defendants emphasize that the completed schedules were needed in order to compute the buy-out figures. They also claim they had no way of computing the unamortized expenses to be repaid under paragraph 11 of the contract without certain additional information from National. Under these circumstances, the defendants argue, National breached its implied duty of cooperation, which requires that a party to a contract do that which is necessary for the other party's performance. By its action it prevented Monkey Grip from performing its obligation to purchase the equipment. *See* L. H. Land Painting Co. v. S & P Construction, Inc., 516 S.W.2d 14, 16 (Tex.Civ. App.1974); Atomic Fuel Extraction Corp. v. Slick's Estate, 386 S.W.2d 180, 186 (Tex.Civ.App.1964), writ ref. n. r. e., 403 S.W.2d 784 (Tex.Sup.Ct.1965); 5 Williston on Contracts (3rd ed. 1961) SS 670, 677, 677A. National counters that although Monkey Grip requested the schedules, it never notified National that it did not possess completed copies of the documents which were needed in order to calculate the contract purchase price.

[1, 2] At the trial there was substantial evidence by several witnesses as to "usage and custom" and testimony by the official of Baker-Thompson Company who negotiated the lease with Monkey Grip as to the discussion of the parties at that time. Texas law governs the admissibility of such evidence because the issue is one of state substantive law governing construction of contracts. Harville Rose Service v. Kellogg Co., 448 F.2d 1346, 1349 (5th Cir. 1971), cert. denied, 405 U.S. 987, 92 S.Ct. 1248, 31 L.Ed.2d 453 (1972); Moore, 1A Federal Practice ¶ 0.313 (2d ed. 1974). Contrary to National's argument, this extrinsic evidence was properly admissible as an aid in interpreting the intention of the parties, the contract itself being ambiguous and uncertain on the termination and purchase procedures. *See* Home Indemnity Co. v. Draper, 504 S.W.2d 570, 578 (Tex.Civ.App.1974); Best Building Co. v. Sikes, 394 S.W.2d 57, 63 (Tex.Civ.App. 1965). The evidence was aimed at proving, and may well have been sufficient to support a jury verdict, that the parties to the contract intended for the buy-out to be completed within the sixty day cancellation period. But what happens if these intentions are thwarted by particular facts and circumstances?

[3, 4] There was little, if any, evidence presented as to the intention of the parties with respect to just how the buy-out was to be effectuated, where the depreciation schedules were not properly attached to the contract so that Monkey Grip could compute the amount that was intended to be paid within the sixty day period. There was little evidence, and no instruction, as to National's duty, if any, to compute the purchase price information and supply the figures to Monkey Grip. In spite of this lack of evidence, the jury found in Special Issue No. 6A, for example, that the parties did intend for information relative to repurchase of the trucks to be furnished within sixty days after written notice of cancellation. In setting aside the jury's finding on this and peripheral facts as against the weight of the evidence, the court engaged in a discretionary exercise of the judicial function reviewable on the abuse of discretion standard. United States v.

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1160.96 Acres of Land, 432 F.2d 910, 915 (5th Cir. 1970). The appeal does not reveal reversible error under such standard.

[5] Once the jury's findings were set aside, the court faced the problem of what to do with the case. It was at this point that the court substituted its own determination that the evidence proved that National had acted reasonably and entered the province of the jury. The evidence being in conflict on the issue, this was error.

The extent of National's obligation to supply Monkey Grip with requested information as a result of Monkey Grip's lack of means of computing the buy-out figures and its repeated requests for the information, was never addressed directly by the court, either before submitting the case to the jury or after the jury's return of the special interrogatories. The court below erred in not addressing the issue as to the nature of National's legal responsibility to supply purchase price information and the vehicle schedules, if any, and the elements that would control the issue of timeliness from a factual or legal standpoint, if it had such a responsibility. Only after the court determines as a matter of law that National had obligation to furnish the requested information, or the jury makes the decision as an issue of fact on proper instructions, is it necessary to consider whether the information was timely furnished. If the information was not timely provided, then the court would need to determine the legal effect of such action.

[6–11] Our decision to remand is premised on the basis of the district court's finding that the jury's answers to the special interrogatories were against the weight and preponderance of the evidence. Such a determination, although not adequate for granting a judgment n. o. v. as was done, Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), can be proper for granting a new trial. Under the *Boeing* standard, a trial judge may grant an instructed verdict or a judgment n. o. v. only where as a matter of law the evidence is insufficient to sustain the claim, issue or defense. But even if the judge finds that the evidence passes muster under that standard, the judge still has wide discretion in granting a new trial. Simmons v. King, 478 F.2d 857, 867 (5th Cir. 1973); United States v. 1160.96 Acres of Land, 432 F.2d 910, 914 (5th Cir. 1970). As Judge Oric L. Phillips, writing for this Court, said in United States ex rel. Weyerhaeuser Co. v. Bucon Construction Co., 430 F.2d 420, 423 (5th Cir. 1970):

> There is an important distinction between a motion for a directed verdict or a motion for a judgment n. o. v. on the one hand and a motion for a new trial on the other. In passing on a motion for a directed verdict, or for a judgment n. o. v., the court does not exercise discretion, but decides a pure question of law, that is, whether the evidence, considered in the light most favorable to the party against whom the motion is directed, affords substantial support for a verdict in his favor.
>
> If a motion for a directed verdict or for a judgment n. o. v. is sustained, judgment is entered for the movant and the case is ended in the trial court, but the sustaining of a motion for a new trial does not result in a final judgment; it only grants another trial by a different jury.
>
> In passing on a motion for a new trial, the court may and should exer-

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cise a sound discretion, and its ruling thereon will not be reviewed in an appellate court in the absence of a clear abuse of discretion.

A trial judge, on a motion for a new trial, may set aside a verdict and grant a new trial, if in his opinion "the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

The exercise of that power is not in derogation of the right of trial by jury, but it is one of the historic safeguards of that right.

The distinction above stated between a motion for a directed verdict or for judgment n. o. v. on the one hand and a motion for a new trial on the other was firmly embedded in the common law and has long been recognized by the decisions of this court and other national courts. (Footnotes omitted).

The above quoted law readily answers the defendants' argument that we should reinstate the jury verdict and direct judgment in defendants' favor because the findings are supported under the Boeing Co. v. Shipman standard. We can reverse the court on the judgment n. o. v. which requires a decision of law that the findings are not supported, but a study of the jury's answers, a thorough review of the record, a careful analysis of the written and oral argument reveals that the district court did not abuse its discretion in deciding that the jury's responses are against the weight of the evidence.

At least partially accounting for the jury's answers may have been the manner in which the questions were drafted, and the failure of counsel to define sharply the factual issues. For instance, in Special Issue No. 1 the jury was asked:

> What do you find from a preponderance of the evidence to be the total depreciated price of the trucks involved herein as of October 21, 1971?
>
> Answer in dollars, if any, and cents, if any, or none.
>
> ANSWER None

Since the jury was asked to supply a figure, the amount of which was fixed by the contract and which was capable of being determined by simple mathematical computation, giving it the option of answering "none" was confusing. The answer given illustrates the jury's lack of comprehension as to some of the issues it was to decide.

We remand the case for a new trial. In view of this disposition of the case, it is unnecessary to reach the other issues raised by the parties.

Reversed and remanded.

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